

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Adoption of Chapter 3-125
Hawaii Administrative Rules

November 7, 1995

SUMMARY

Chapter 125 of Title 3, Hawaii Administrative Rules, entitled "Modifications and Terminations of Contracts", is adopted.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 125

MODIFICATIONS AND TERMINATIONS OF CONTRACTS

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§3-125-1 General. (a) Subject to subsection (b), the contract clauses in this chapter are required for use in invitation for bids or requests for proposals and may be used in other contracts subject to chapter 103D, HRS. Clauses that are specific for a certain category of goods, services, or construction are not required for contracts of another category. For example, specific clauses applicable only to goods and services are not required for construction contracts.

(b) If the clauses set forth in this chapter are plainly inappropriate for use in a proposed contract, then the chief procurement officer or the head of a purchasing agency shall make a written determination describing the circumstances requiring a material variation, provided that notice of any variation shall be stated in the invitation for bids or requests for proposals. [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-2 Change orders to goods and services contracts. (a) A change order is a written order signed by the procurement officer, directing the contractor to make changes which the "change clause" of

the contract authorizes the procurement officer to order without the consent of the contractor.

(b) The following paragraphs, or similar statements expressing the intent of the paragraphs, shall be included in all contracts for goods and services:

- (1) "Change clause. By written order, at any time, and without notice to any surety, the procurement officer may, unilaterally, order of the contractor:

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- (A) Changes in the work within the scope of the contract; and
 - (B) Changes in the time of performance of the contract that do not alter the scope of the contract work.
- (2) Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this contract or as negotiated. Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the procurement officer promptly and duly makes the provisional adjustments in payment or time for the direct costs of the work as the State deems reasonable. The right of the contractor to dispute the contract price or time or both shall not be waived by its performing the work, provided however, that it follows the written notice requirements for disputes and claims established by the contract or these rules.
- (3) Time period for claim. Within ten days after receipt of a written change order, unless the period is extended by the procurement officer in writing, the contractor shall respond with

a claim for an adjustment. The requirement for a timely written response cannot be waived and shall be a condition precedent to the assertion of a claim.

- (4) Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if written response is not given prior to final payment under this contract.
- (5) Claims not barred. In the absence of a change order, nothing in this clause shall be deemed to restrict the contractor's right to pursue a claim under the contract or for breach of contract." [Eff DEC 15 1995]

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(Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-3 Modifications to goods and services contracts. (a) A contract modification is a written alteration within the scope of the contract to specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of a contract accomplished by mutual action of the parties to the contract.

(b) The following clauses, or similar statements expressing the intent of the clauses, shall be included in all contracts for goods and services:

- (1) "Contract modification. By a written order, at any time, and without notice to any surety, the procurement officer, subject to mutual agreement of the parties to the contract and all appropriate adjustments, may make modifications within the general scope of this contract to include any one or more of the following:
 - (A) Drawings, designs, or specifications, for the goods to be furnished;
 - (B) Method of shipment or packing;
 - (C) Place of delivery;
 - (D) Description of services to be performed;
 - (E) Time of performance (i.e., hours of the day, days of the week, etc.);

- (F) Place of performance of the services; or
 - (G) Other provisions of the contract accomplished by mutual action of the parties to the contract.
 - (2) Adjustments of price or time for performance. If any modification increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this contract or as negotiated.
 - (3) Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if written agreement of modification is not made prior to final
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- payment under this contract.
- (4) Claims not barred. In the absence of a contract modification, nothing in this clause shall be deemed to restrict the contractors right to pursue a claim under the contract or for a breach of contract."
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-4 Changes for construction contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all construction contracts:

- (1) "Change order. The procurement officer, at any time, and without notice to any surety, in a signed writing designated or indicated to be a change order, may make changes in the work within the scope of the contract as may be found to be necessary or desirable. Such changes shall not invalidate the contract or release the sureties, and the contractor will perform the work as changed, as though it had been part of the original contract. Minor changes in the work may be directed by the

procurement officer at no change in contract price or time.

- (2) Adjustments of price or time for performance. If any change order increases or decreases the contractor's cost of, or the time required for performance of any part of the work under this contract, whether or not changed by the order, an adjustment may be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract. Failure of the parties to agree to an adjustment shall not excuse a contractor from proceeding with the contract as changed, provided that the State promptly and duly makes such provisional adjustments in payments or time for the direct costs of the work as changed as the State deems reasonable. The right of the contractor to dispute the contract price or time or both shall not be waived by its performing the work, provided however, that

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it follows the notice requirements for disputes and claims established by the contract or these rules.

- (3) Time period for claim. Within thirty days after receipt of a written change order under paragraph (1), unless such period is extended by the procurement officer in writing, the contractor shall file a notice of intent to assert claim for an adjustment. The requirement for timely written notice cannot be waived and shall be a condition precedent to the assertion of a claim.
- (4) Claim barred after final payment. No claim by the contractor for an adjustment hereunder shall be allowed if written notice is not given prior to final payment under this contract.
- (5) Claims not barred. In the absence of such a change order, nothing in this clause shall restrict the contractor's right to pursue a

claim arising under the contract or for breach of contract." [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D- 501)

§3-125-5 Authorization for a stop work order for goods and services contracts. (a) The paragraphs, or similar statements expressing the intent of the paragraphs set forth in section 3-125-6, shall be included in any fixed-price contract for goods and services under which work stoppage may be required for reasons such as advancements in the state of the art, production modifications, engineering changes, or realignment of programs.

(b) Because stop work orders may result in increased cost by reason of standby costs, the orders shall be issued only with prior approval of the chief procurement officer, the head of a purchasing agency, or designees of either officer. Generally, use of a stop work order will be limited to situations in which it is advisable to suspend work pending a decision to proceed and a supplemental agreement providing for the suspension is not feasible. A stop work order may not be used in lieu of the issuance of a termination notice after a decision to terminate has been made.

(c) Stop work orders shall not exceed sixty consecutive days and shall include, as appropriate:

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- (1) A clear description of the work to be suspended;
- (2) Instructions as to the issuance of further orders by the contractor for material or services;
- (3) Guidance as to action to be taken on subcontracts; and
- (4) Other instructions and suggestions to the contractor for minimizing costs.

(d) Promptly after issuance, stop work orders should be discussed with the contractor and should be modified, if necessary, in the light of such discussions.

(e) As soon as feasible after a stop work order is issued:

- (1) The contract will be terminated; or
- (2) The stop work order will be canceled or extended in writing beyond the period specified in the order.

(f) In any event, whether the contract is terminated or the stop work order is extended, action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order. [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-6 Stop work orders for goods and services contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all goods and services contracts:

- (1) "Order to stop work. The procurement officer, may, by written order to the contractor, at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding sixty days after the order is delivered to the contractor, unless the parties agree to any further period. Any order shall be identified specifically as a stop work order issued pursuant to this section. Upon receipt of an order, the contractor shall forthwith comply with its terms and take all

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reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall have agreed, the procurement officer shall either:

- (A) Cancel the stop work order; or
- (B) Terminate the work covered by the order as provided in the 'termination for

- default clause' or the 'termination for convenience clause' of this contract.
- (2) Cancellation or expiration of the order. If a stop work order issued under this section is canceled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if:
- (A) The stop work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract; and
 - (B) The contractor asserts a claim for an adjustment within thirty days after the end of the period of work stoppage; provided that, if the procurement officer decides that the facts justify such action, any claim asserted may be received and acted upon at any time prior to final payment under this contract.
- (3) Termination of stopped work. If a stop work order is not canceled and the work covered by the order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowable by adjustment or otherwise.
- (4) Adjustment of price. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract."
- [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-7

3-125-7 Suspension of work for construction contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all construction contracts:

- (1) "Suspension of work. The procurement officer may, by written order, suspend the performance of the work, either in whole or in part for periods as he may deem necessary for any cause, including but not limited to:
 - (A) Weather or soil conditions considered unsuitable for prosecution of the work;
 - (B) Failure on the part of the contractor to:
 - (i) Correct conditions unsafe for the general public or for the workers;
 - (ii) Carry out orders given by the procurement officer;
 - (iii) Perform the work in strict compliance with the provisions of the contract; or
 - (iv) Provide adequate supervision on the jobsite.
 - (C) Whenever a redesign that may affect the work is deemed necessary by the procurement officer;
 - (D) Unacceptable noise or dust arising from the construction even if it does not violate any law or regulation; or
 - (E) The convenience of the State.
- (2) Partial and total suspension. Suspension of work on some but not all items of work shall be considered a "partial suspension". Suspension of work on all items shall be considered "total suspension". The period of suspension shall be computed from the date set out in the written order for work to cease until the date of the order for work to resume.
- (3) Reimbursement to contractor. In the event that the contractor is ordered by the procurement officer in writing as provided herein to suspend all work under the contract in accordance with subparagraph (C), (D) or (E), the contractor may be reimbursed for actual money expended towards the project during the period of suspension. No allowance will be made for anticipated profits.

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- (4) Cost adjustment. If the performance of all or part of the work is suspended for reasons beyond the control of the contractor, an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such suspension, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension:
- (A) To the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor; or
 - (B) For which an adjustment is provided for or excluded under any other provision of this contract.
- (5) Claims for adjustment. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the provisions on changes and claims for adjustment. Claims for compensation shall be filed in writing with the procurement officer within thirty days after the date of the order to resume work or the claims will not be considered. Together with the claim, the contractor shall submit substantiating documents covering the entire amount shown on the claim. The procurement officer shall take the claim under consideration and may make such investigations as are deemed necessary and shall be the sole judge as to the equitability of the claim and the procurement officer's decision shall be final.
- (6) No adjustment. No provision of this clause shall entitle the contractor to any adjustments for delays due to failure of surety, for suspensions made at the request of the contractor, for any delay required under the contract, for suspensions, either partial or whole, made by the procurement officer under the provisions in subparagraph (1)(B) of this section."
- [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

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§3-125-8 Variations in quantities for definite quantity goods and services contracts. The following statement, or similar statements expressing the same intent, shall be included in definite quantity goods or services contracts:

"Variation in quantity. Upon the agreement of the parties, the quantity of goods or services or both specified in this contract may be increased by a maximum of ten per cent provided (1) the unit prices will remain the same except for any price adjustments otherwise applicable and (2) the procurement officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-9 Variations in quantities for indefinite quantity goods and services contracts. No statements are provided in this section, because in indefinite quantity contracts, the flexibility as to the State's obligation to order and the contractor's obligation to deliver should be designed to meet using agency needs, while still making the contract as attractive as possible to potential contractors, to obtain maximum practicable competition and to assure the best economy for the State. However, in each case, the contract should state:

- (1) The minimum quantity, if any, the State is obligated to order and the contractor is to provide;
- (2) Whether there is a quantity the State expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under the contract;
- (3) Any maximum quantity the State may order and the contractor must provide; and
- (4) Whether the State is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in section 3-122-145, that the State will order its actual requirements from the contractors under the multiple award subject to any minimum or maximum quantity stated.

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§3-125-10 Variations in estimated quantities for construction contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included only in those construction contracts which contain estimated quantity items:

- (1) "Variations requiring adjustments. Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than fifteen per cent above or below the estimated quantity stated in this contract, an adjustment in the contract price shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above one hundred fifteen per cent or below eighty-five per cent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the procurement officer shall, upon receipt of a timely written request for an extension of time, prior to the date of final settlement of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgment of the procurement officer the findings justify.
- (2) Adjustment of price. Any adjustment in contract price made shall be determined in accordance with the price adjustment section of this contract." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-11 Differing site conditions for construction contracts. Paragraph (1) or similar statements expressing the same intent, shall be included in all construction contracts in which the procurement officer determines that the contractor

should not accept the risk of differing site conditions. Where the procurement officer determines that a contractor must accept the risk of differing site conditions, the clause in paragraph (2), or similar statement expressing the intent of the clause, shall be included.

(1) "Differing site conditions - Price

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adjustments.

- (A) Notification. The contractor shall promptly, and before such conditions are disturbed, notify the procurement officer of:
 - (i) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or
 - (ii) Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.
- (B) Adjustments of price or time for performance. After receipt of the notice, the procurement officer shall promptly investigate the site, and if it is found that the conditions do materially so differ and cause an increase in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of the conditions, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract.
- (C) Timeliness of claim. No claim of the contractor under this clause shall be allowed unless the contractor has given

the notice required in this clause; provided, however, that the time prescribed therefore may be extended by the procurement officer in writing.

- (D) No claim after final payment. No claim by the contractor for an adjustment thereunder shall be allowed if asserted after final payment under this contract.
- (E) Knowledge. Nothing contained in this clause shall be grounds for an adjustment in compensation if the contractor had actual knowledge of the

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existence of such conditions prior to the submission of bids.

- (2) Differing site conditions - contractor's responsibility. The contractor accepts the conditions at the construction site as they eventually may be found to exist and warrants and represents that the contract can and will be performed under such conditions, and that all materials, equipment, labor, and other facilities required because of any unforeseen conditions (physical or otherwise) shall be wholly at the contractor's own cost and expense, anything in this contract to the contrary notwithstanding."
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

3-125-12 Price adjustment for goods and services contracts. (a) The following paragraph or similar statement expressing the intent of the paragraph, shall be included in all applicable goods and services contracts for which price adjustments will be allowed:

"Price adjustment. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:

- (A) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
- (B) By unit prices specified in the contract or subsequently agreed upon;

- (C) By the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;
 - (D) In such other manner as the parties may mutually agree; or
 - (E) In the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126."
- (b) Submission of cost or pricing data. The

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contractor shall provide cost or pricing data for any price adjustments subject to the provisions of subchapter 15, chapter 3-122. [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-312, 103D-501, 103D-601, 103D-703)

§3-125-13 Price adjustment for construction contracts. (a) The paragraphs in this subsection, or similar statements expressing the intent of these paragraphs, shall be included in all applicable construction contracts for which price adjustments will be allowed:

- (1) "Price adjustment. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:
 - (A) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon as practicable;
 - (B) By unit prices specified in the contract or subsequently agreed upon;
 - (C) Whenever there is a variation in quantity for any work covered by any line item in breakdown costs provided by the contractor pursuant to contractual pre-work submittal requirements, by the

- procurement officer, at the procurement officer's discretion, adjusting the lump sum price proportionately;
- (D) In such other manner as the parties may mutually agree; or
 - (E) At the sole option of the procurement officer, by the costs attributable to the event or situation covered by the change, plus appropriate profit or fee;
 - (F) In the absence of agreement between the parties, by a unilateral determination by the procurement officer of the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as computed by the procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126.
- (2) Determining the cost or credit. In determining the cost or credit to the State

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- resulting from a change, the allowances for all overhead, extended overhead resulting from adjustments to contract time (including home office and field overhead) and profit combined, shall not exceed the percentages set forth below:
- (A) For the contractor, for any work performed by its own labor forces, fifteen percent of the cost;
 - (B) For each subcontractor involved, for any work performed by its own forces, fifteen percent of the cost;
 - (C) For the contractor or any subcontractor, for work performed by their subcontractors, seven percent of the amount due the performing subcontractor.
- (3) Percentages for fee and overhead. Not more than three line item percentages for fee and overhead, not to exceed the maximum percentages shown above, will be allowed regardless of the number of tier subcontractors." [Eff DEC 15 1995]

§3-125-14 Novation or change of name. The following paragraphs are authorized for use in all contracts:

- (1) "No assignment. No State contract is transferable, or otherwise assignable, without the written consent of the chief procurement officer or the head of a purchasing agency provided that a contractor may assign monies receivable under a contract after due notice to the State.
- (2) Recognition of a successor in interest; assignment. When in the best interest of the State, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee and the State shall agree that:
 - (A) The transferee assumes all of the transferor's obligations;
 - (B) The transferor remains liable for all obligations under the contract but waives all rights under the contract as against the State; and

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- (C) The transferor shall continue to furnish, and the transferee shall also furnish, all required bonds.
- (3) Change of name. When a contractor requests to change the name in which it holds a contract with the State, the procurement officer responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

- (4) Reports. All change of name or novation agreements effected hereunder other than by the chief procurement officer shall be reported to the chief procurement officer within thirty days of the date that the agreement becomes effective.
- (5) Actions affecting more than one purchasing agency. Notwithstanding the provisions of paragraphs (1)(C) through (1)(C), when a contractor holds contracts with more than one purchasing agency of the State, the novation or change of name agreements herein authorized shall be processed only through the office of the chief procurement officer." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

3-125-15 Claims based on a procurement officer's actions or omissions for goods and services contracts.

The following paragraphs, or similar statements expressing the intent of the paragraphs, shall be included in all goods and services contracts:

- (1) "Claims based on a procurement officer's actions or omissions. If any action or omission on the part of a procurement officer or designee of such officer, requiring performance changes within the scope of the contract constitutes the basis for a claim by the contractor for additional compensation, damages, or an extension of time for completion, the contractor shall continue

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with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

- (A) The contractor shall have given written notice to the procurement officer or designee of the officer:
 - (i) Prior to the commencement of the work involved, if at that time the

- contractor knows of the occurrence of the action or omission;
 - (ii) Within thirty days after the contractor knows of the occurrence of the action or omission, if the contractor did not have knowledge prior to the commencement of the work; or
 - (iii) Within further time as may be allowed by the procurement officer in writing.
- (B) This notice shall state that the contractor regards the act or omission as a reason which may entitle the contractor to additional compensation, damages, or an extension of time. The procurement officer or designee of the officer, upon receipt of the notice may rescind the action, remedy the omission, or take other steps as may be deemed advisable in the discretion of the procurement officer or designee of the officer;
- (C) The notice required by subparagraph (A) describes as clearly as practicable, at the time, the reasons why the contractor believes that additional compensation, damages, or an extension of time may be remedies to which the contractor is entitled; and
- (D) The contractor maintains and, upon request, makes available to the procurement officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time

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- in connection with the changes.
- (2) Nothing herein contained, however, shall excuse the contractor from compliance with any rules of law precluding any state officers and any contractors from acting in collusion or bad faith in issuing or

performing change orders which are clearly not within the scope of the contract.

- (3) Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract."
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D- 501) (Imp: HRS §103D-501)

3-125-16 Claims based on oral directives for construction contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all construction contracts:

- (1) "Any oral order, direction, instruction, interpretation or determination from the procurement officer which, in the opinion of the contractor, causes any change, can be considered as a change only if the contractor gives the procurement officer written notice of its intent to treat the oral order, direction, instruction, interpretation or determination as a change directive. The written notice must be delivered to the procurement officer before the contractor acts in conformity with the oral order, direction, instruction, interpretation or determination, but not more than five days after delivery of the oral order to the contractor. The written notice shall state the date, circumstances, whether a time extension will be requested, and source of the order that the contractor regards as a change. The written notice may not be waived and shall be a condition precedent to the filing of a claim by the contractor. Unless the contractor acts in accordance with this procedure, any oral order shall not be treated as a change and the contractor waives any claim for an increase in the contract time or contract price related to the work.

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- (2) Not more than five days after receipt of the written notice from the contractor, the procurement officer shall issue a change order for the subject work if the procurement officer agrees that it constitutes a change. If no change order is issued in the time established, it shall be deemed a rejection of contractor's claim for a change. If the contractor objects to the procurement officer's refusal to issue a change order, it shall file a written protest with the procurement officer within thirty days after delivery to the procurement officer of the contractor's written notice of its intention to treat the oral order as a change. In all cases the contractor shall proceed with the work. The protest shall be determined as provided in the disputes and claims section of the contract." [Eff DEC 15 1995]
(Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-17 Termination for default in goods and services contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all goods and services contracts:

- (1) "Default. If the contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the procurement officer may notify the contractor in writing of the delay or non-performance and if not cured in ten days or any longer time specified in writing by the procurement officer, the officer may terminate the contractor's right to proceed with the contract or a part of the contract as to which there has been delay or other breach of contract. In the event of termination in whole or in part the procurement officer may procure similar goods or services in a manner and upon terms deemed appropriate by the

§3-125-17

procurement officer. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

- (2) Contractor's duties. Notwithstanding termination of the contract and subject to any directions from the procurement officer, the contractor shall take timely and necessary action to protect and preserve property in the possession of the contractor in which the State or county has an interest.
- (3) Compensation. Payment for completed goods delivered and accepted by the State shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the contractor and procurement officer; if the parties fail to agree, the procurement officer shall set an amount subject to the contractor's rights under chapter 3-126. The State may withhold from amounts due the contractor as the procurement officer deems to be necessary to protect the State against loss because of outstanding liens or claims of former lien holders and to reimburse the State for the excess costs incurred in procuring similar goods and services.
- (4) Excuse for nonperformance or delayed performance. Except with respect to defaults of subcontractors, the contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms, if the contractor has notified the procurement officer within fifteen days after the cause of the delay and the failure arises out of causes including but not limited to the following: acts of God; acts of the public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to

make progress, and if the failure arises out of causes similar to those set forth above,

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the contractor shall not be deemed to be in default, unless the goods or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements. Upon request of the contractor, the procurement officer shall ascertain the facts and extent of the failure, and, if the officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the State under the clause entitled in fixed-price contracts, 'Termination for Convenience' and in cost-reimbursement contracts, 'Termination'. As used in this paragraph, the term 'subcontractor' means subcontractor at any tier.

- (5) Additional rights and remedies. The rights and remedies provided in this contract are in addition to any other rights and remedies provided by law." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-18 Default, delay, and time extensions for construction contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all construction contracts:

- (1) "Default. If the contractor refuses or fails to perform the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof, fails to complete the work within such time,

or commits any other substantial breach of this contract, and further fails within seven days after receipt of written notice from the procurement officer to commence and continue correction of the refusal or failure with diligence and promptness, the procurement officer may, by written notice to the

§3-125-18

contractor, declare the contractor in breach and terminate the contractor's right to proceed with the work or the part of the work as to which there has been delay or other breach of contract. In the event the State may take over the work and perform the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, the materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, the contractor and the contractor's sureties shall be liable for any damage to the State resulting from the contractor's refusal or failure to complete the work within the specified time.

- (2) Liquidated damages upon termination. If fixed and agreed liquidated damages are provided in the contract, and if the State so terminates the contractor's right to proceed, the resulting damage will consist of the liquidated damages for the time as may be required for final completion of the work.
- (3) Liquidated damages in absence of termination. If fixed and agreed liquidated damages are provided in the contract, and if the State does not terminate the contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.
- (4) Time extension. The contractor's right to proceed shall not be so terminated nor shall the contractor charged with resulting damage if:

- (A) The delay in the completion of the work arises from causes such as: acts of God; acts of the public enemy; acts of the State and any other governmental entity

contract are in addition to any other rights and remedies provided by law."
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-19 Liquidated damages for goods and services contracts. The following statement captioned "Liquidated damages" may be used in goods or services contracts when it is difficult to determine with reasonable accuracy the amount of damage to the State due to delays caused by late contractor performance or nonperformance and the contract contains the termination for default clause set forth in section 3-125-17:

"Liquidated damages. When the contractor is given notice of delay or nonperformance as specified in [section 3-125-17(1)] of the termination for default clause of this contract and fails to cure

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in the time it is agreed specified, the contractor shall pay to the State the amount of [\$_____] per calendar day from date set for cure until either the State reasonably obtains similar goods or services if the contractor is terminated for default, or until the contractor provides the goods or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under [section 3-125-17(4)], excuse for nonperformance or delayed performance of the termination for default clause of this contract, liquidated damages shall not be due the State. The contractor remains liable for damages caused other than by delay." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

3-125-20 Liquidated damages for construction contracts. The following statement captioned "Liquidated damages" may be used in construction contracts when it is difficult to determine with

reasonable accuracy damage to the State due to delays cause by late contractor performance or nonperformance:

"Liquidated damages. When the contractor fails to complete the work or any portion of the work within the time or times fixed in the contract or any extension thereof, it is agreed the contractor shall pay to the State the amount of [\$] per calendar day of delay." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-21 Termination for convenience of goods and services contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all goods and services contracts:

- (1) "Termination for convenience. The procurement officer may, when the interests of the State so require, terminate this contract in whole or in part, for the convenience of the State. The procurement officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when

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termination becomes effective.

- (2) Contractor's obligations. The contractor shall incur no further obligations in connection with the terminated work and on the dates set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the State's approval. The procurement officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the State. The contractor must still complete the work not

terminated by the notice of termination and may incur obligations as are necessary to do so.

- (3) Right to goods. The procurement officer may require the contractor to transfer title and deliver to the State in the manner and to the extent directed by the procurement officer:

- (A) Any completed goods; and
- (B) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights, hereinafter called "manufacturing material," as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract."

The contractor shall, upon direction of the procurement officer, protect and preserve property in the possession of the contractor in which the State has an interest. If the procurement officer does not exercise this right, the contractor shall use the contractor's best efforts to sell such goods and manufacturing materials. Use of this section in no way implies that the State has breached the contract by exercise of the termination for convenience clause.

- (4) Compensation:

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- (A) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by subchapter 15, chapter 3-122, bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the procurement officer may pay the contractor, if at all, an amount set in accordance with subparagraph (C).

- (B) The procurement officer and the contractor may agree to settlement provided the contractor has filed a termination claim supported by cost or pricing data to the extent required by subchapter 15, chapter 3-122, and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the State, the proceeds of any sales of goods and manufacturing materials under subparagraph (C) of this clause, and the contract price of the work not terminated.
- (C) Absent complete agreement under subparagraph (B), the procurement officer shall pay the contractor the following amounts, provided payments agreed to under paragraph (2) shall not duplicate payments under this subparagraph for the following:
 - (i) Contract prices for goods or services accepted under the contract;
 - (ii) Costs incurred in preparing to perform and performing the terminated portion of the work plus a five percent markup on actual direct costs on such portion of the work, the markup shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided that if it appears that the contractor would have sustained a loss if the

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entire contract would have been completed, no markup shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

- (iii) Subject to the prior approval of the procurement office the costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to paragraph (2). Subcontractors shall be entitled to a markup of no more than ten percent on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with clause (ii) of subparagraph (C).
- (iv) The total sum to be paid the contractor under this subparagraph shall not exceed the total contract price reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph (B), and the contract price of work not terminated.
- (D) Cost claimed, agreed to, or established under subparagraphs (B) and (C) shall be in accordance with chapter 3-123."
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501 (Imp: HRS §§103D-312, 103D-501, 103D-601)

§3-125-22 Termination for convenience of construction contracts. The following paragraphs, or similar statements expressing the intent of these paragraphs, shall be included in all construction contracts:

- (1) "Terminations. The procurement officer may, when the interests of this State so require, terminate this contract in whole or in part, for the convenience of the State. The procurement officer shall give written notice of the termination to the contractor specifying the part of the contract

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terminated and when termination becomes effective.

- (2) Contractor's obligations. The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work subject to the State's approval. The procurement officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the State. The contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.

- (3) Right to construction and goods. The procurement officer may require the contractor to transfer title and deliver to the State in the manner and to the extent directed by the procurement officer:

- (A) Any completed constructions; and
- (B) The partially completed construction, goods, materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "construction material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The contractor shall protect and preserve property in the possession of the contractor in which the State has an interest. If the procurement officer does not exercise this right, the contractor shall use best efforts to sell the construction, goods, and construction materials in accordance with the standards of section 490:2-706, HRS. This in no way implies that the State has breached the contract by exercise of the termination for convenience clause.

- (4) Compensation.

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- (A) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, submitted to the extent required by subchapter 15, chapter 3-122, bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the procurement officer may pay the contractor, if at all, an amount set in accordance with clause (ii) of subparagraph (C).
- (B) The procurement officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the State, the proceeds of any sales of construction, goods, and construction materials under clause (iii) of subparagraph (C), and the contract price of the work not terminated.
- (C) Absent complete agreement under subparagraph (B), the procurement officer shall pay the contractor the following amounts, provided payments under subparagraph (B) shall not duplicate payments under this paragraph, for the total (without duplication of any items) of:
 - (i) The cost of all contract work performed prior to the effective date of the notice of termination plus a five percent markup on actual direct costs on the portion of the work (the markup shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of the work; provided, however, that if it appears that

the contractor would have sustained
a loss if the entire contract would

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have been completed, no markup
shall be allowed or included and
the amount of compensation shall be
reduced to reflect the anticipated
rate of loss;

- (ii) Subject to the prior approval of
the procurement officer, the costs
of settling and paying claims
arising out of the termination of
subcontracts or orders pursuant to
paragraph (2) of this subsection.
Subcontractors shall be entitled to
a markup of no more than ten
percent on direct costs incurred to
the date of termination. These
costs must not include costs paid
in accordance with clause (i);

- (iii) The total sum to be paid the contractor
under this paragraph shall not
exceed the total contract
price reduced by the
amount of any sales
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- (D) Cost claimed, agreed to, or established under subparagraphs (B) and (C) shall be in accordance with chapter 3-123."
[Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §§103D-312, 103D-501, 103D-601, 490:2-706)

§3-125-23 Prompt payment by contractors to subcontractors. The following statements, or similar statements expressing the same intent, shall be included in all contracts:

"Prompt payment clause. Any money, other than retainage, paid to a contractor shall be dispersed to subcontractors within ten days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and

Upon final payment to the contractor, full payment to the subcontractor, including retainage, shall be made within ten days after receipt of the

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money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

§3-125-24 Remedies clause. The following clause, or a similar statement expressing the intent of the clause, shall be included in all contracts:

"Remedies clause. Any dispute arising under or out of this contract is subject to chapter 3-126." [Eff DEC 15 1995] (Auth: HRS §§103D-202, 103D-501) (Imp: HRS §103D-501)

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Chapter 3-125, Hawaii Administrative Rules, on the Summary Page dated November 7, 1995, was adopted on November 7, 1995, following a public hearing held on September 21, 1995 in Kailua-Kona, Hawaii; September 22, 1995 in Hilo, Hawaii; September 26, 1995 in Honolulu, Hawaii; October 10, 1995 in Wailuku, Maui; and on October 20, 1995 in Lihue, Kauai, after public notice was given in the Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island on August 21, 1995, and in The Honolulu Advertiser on August 22, 1995.

The adoption of chapter 3-125 shall take effect ten days after filing with the Office of the Lieutenant Governor.

Haruo Shigezawa
Chairperson
Procurement Policy Board

Sam Callejo
State Comptroller

APPROVED:

Benjamin J. Cayetano
Governor
State of Hawaii

Dated: _____

APPROVED AS TO FORM:

Deputy Attorney General

Filed